

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

John Difeo d/b/a Dredz International Imports

v.

Town of Plaistow

Docket No. 00-E-0218

ORDER

Petitioner seeks a declaratory judgment that respondent's zoning ordinance prohibiting body piercing in the Town of Plaistow is unconstitutional, that the Town may regulate but not prohibit body piercing, and that petitioner is authorized to practice body piercing in his Plaistow store. Respondent objects and claims that its zoning ordinance is valid and constitutional, and that petitioner may not practice body piercing in the Town of Plaistow. The court held a trial on the merits on August 2, 2001, which continued on January 17, 2002.

In 1999, petitioner, John Difeo, became interested in expanding his business, Dredz International Imports, to include an additional location. In addition to being retail establishments that sold such items as clothing, jewelry, gifts and seasonal items, petitioner's establishments offered patrons tattoos and body piercing. In December 1999, petitioner hired a real-estate agent who researched local ordinances in the Town of Plaistow, New Hampshire, and found no prohibitions on the type of establishment petitioner was interested in opening in the Town's C-1 zone. On January 12, 2000, petitioner signed

a lease proposal for space in a shopping center in the C-1 zone in the Town of Plaistow.

In February 2000, petitioner met with the Town of Plaistow's health officer, Mary Ellen Tufts, to discuss the nature of his intended store. Subsequently, petitioner met with the Town of Plaistow's building inspector regarding his plans. Neither Tufts nor the building inspector advised petitioner that he would not be allowed to conduct body piercing in the Town of Plaistow. Rather, Tufts told petitioner that the Town of Plaistow was interested in adopting body piercing regulations. Petitioner gave Tufts a copy of Seabrook's regulations as it pertained to his establishment there, and Tufts visited petitioner's Seabrook location. Petitioner attended public hearings in the Town of Plaistow and provided Tufts with draft health ordinances on the subject of body piercing.

In March 2000, at the Plaistow Town Meeting, respondent adopted a zoning amendment which allowed tattooing and body piercing in the C-1 zone. On April 7, 2000, petitioner signed a lease and paid a deposit for commercial space in the C-1 zone. Petitioner made significant improvements to the space to accommodate his retail business and additional improvements to accommodate his body piercing practice.

On April 11, 2000, Tufts told petitioner that the draft health ordinances were presented to the Board of Selectmen. On that date, Tufts advised petitioner for the first time that the Board of Selectmen could prohibit body piercing in the Town of Plaistow. On April 17, April 24, and on May 1, the Board of Selectmen considered draft health ordinances and held public hearings on regulating, not prohibiting,

body piercing. On May 8, the Board of Selectmen adopted an ordinance prohibiting, inter alia, body piercing and tattooing, except by a licensed physician. In September 2000, at a Special Town Meeting, the Town of Plaistow adopted a zoning ordinance that completely prohibits body piercing. In October 2000, after the improvements were completed, petitioner received an occupancy permit for the commercial space. Petitioner, however, has not performed body piercing at this location.

Petitioner instituted this action to remove the Town of Plaistow's prohibition on body piercing. First, petitioner contends that body piercing is an ancient art form. Petitioner represents that body piercing is multi-cultural and is practiced for a variety of aesthetic, spiritual, religious and personal expression reasons. Petitioner advances, therefore, that body piercing is protected by the First Amendment to the United States Constitution and by Part I, Articles 5 and 22 of the New Hampshire Constitution. Petitioner asserts that the Town of Plaistow cannot completely prohibit body piercing, but can regulate the practice in a reasonable manner. Next, petitioner contends that he relied on respondent's representations when he entered into his lease and when he contracted to make improvements. Petitioner contends that respondent is therefore estopped from enforcing its prohibition on body piercing as it relates to petitioner.

The Town of Plaistow espouses the opposite view. First, respondent claims that even if body piercing is speech, the Town of Plaistow may enact laws that promote the health, safety, and morals of the general

welfare. Respondent contends that under RSA chapter 329 and 314, prohibiting body piercing does not unreasonably burden petitioner's free speech. Next, respondent claims that the body piercing prohibition is not a zoning restriction but a health ordinance and is therefore not subject to "vesting" or "estoppel".

I. Body Piercing as Symbolic Speech

The first question before the court is whether body piercing constitutes symbolic expression. "The United States Supreme Court has not yet established a test for finding when 'conduct becomes so intertwined with expression' that it becomes symbolic speech entitled to first amendment protection." State v. Cline, 113 N.H. 245, 247 (1973) (quoting Cowgill v. California, 396 U.S. 371, 372 (1970)); see State v. Royal, 113 N.H. 224, 228 (1973). "In a number of cases, however, ideas communicated nonverbally were held entitled to constitutional protection." Cline, 113 N.H. at 247 (citing Stromberg v. California, 283 U.S. 359 (1931); West Virginia St. Bd. of Educ. v. Barnett, 319 U.S. 624 (1943); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Schacht v. United States, 398 U.S. 58 (1970)).

Petitioner testified that his clients consult him prior to the act of body piercing. Petitioner and client discuss the various types of piercing that are available, whether the client has any special requests, and what message the client is seeking to express through the piercing. Petitioner testified that aside from the element of personal beautification, clients seek to express cultural, ritualistic, and religious aspects through his art. Petitioner revealed that he has had

clients who have requested identical body piercings to express their bonds as a couple; and some clients have requested matching body piercings to reflect their mother-daughter bonding relationship.

Petitioner testified to examples of clients who have expressed themselves using his medium as an art form. For example, petitioner produced a picture of a client who came to him after having the image of a bull tattooed on his chest. The client wished to have a metal ring pierced through the bull's nose, the location of which corresponded with the client's nipple. (Exhibit 7). Petitioner also detailed a client's preparation for her nuptials. She requested four hoops pierced in each of two lines down her back, through these hoops the client laced her wedding gown.

The art of body piercing has been practice as far back as ancient Egyptian times.¹ Petitioner's witness, Nicole Provost, testified to her

¹ "[Septum] piercing is predominant amongst inhabitants of India, Africa and Polynesia." Respondent's Objection to Motion for Temporary Injunction, Exhibit D, The Eye of the Needle. "The labret piercing is seen amongst the people of certain South American tribes, Kenya, Zambezi and North Cameroon and have symbolic meanings. Some tribes enlarge the labret piercing to accommodate a large plug or disc." Id. "The navel piercing was a sign of royalty to the Ancient Egyptians and was sometimes denied to commoners, hence a deep navel was highly prized.... This piercing is still greatly sought after and admired, is purely visual and lends itself to imaginative and decorative effects." Id. "It is said that Roman Centurions wore nipple rings as a sign of virility and courage and as a dress accessory to hold their short capes in place." Id. "The scrotal sac piercing is said to have originated from Arabia where a ring is inserted in the left side of the scrotum during a ceremonial piercing when a youth achieves manhood." Id. "Used in ancient Rome on male slaves or athletes to ensure chastity, the foreskin is pierced on each side and a clasp or lock is inserted through both piercings ensuring that the foreskin is held in place covering the glans. Today this piercing is used mainly as a means of displaying eye-catching ornaments and does not have a particularly sexual function." Id.

body piercing practices. She testified that in addition to the decorative effect, her piercings have a spiritual rationale. Provost testified that she pierces her body as an expression of her passing different personal milestones in her life and that body piercing to her is a rite of passage.

The court finds that body piercing is symbolic speech. Tinker, 393 U.S. 503. The primary purpose of the body piercing is the expression of ideas. Id. Compare e.g. Grossman v. Baumgartner, 254 N.Y.S.2d 335, 338 (1964) ("It is still true that there is no accounting for taste, but the decoration, so called, of the human body by tattoo design is, in our culture, a barbaric survival, often associated with a morbid or abnormal personality") with Commonwealth v. Meuse, 10 Mass.L.Rptr. 661 (Mass. Super. 1999) ("The cultural status of tattooing has steadily evolved from that of an anti-social activity in the 1960s to that of a trendy fashion statement in the 1990s.... Tattooing is recognized by government agencies as both an art form and a profession and tattoo-related art work is the subject of museum, gallery and educational institution art shows across the United States.")

II. Regulating Speech is Permissible

"To characterize defendant's conduct as symbolic speech would not resolve the issue, for symbolic speech is not afforded the same first and fourteenth amendment protection as ideas communicated by pure speech. Cline, 113 N.H. at 248 (citing Cox v. Louisiana, 379 U.S. 536, 555 (1965) and Street v. New York, 394 U.S. 576 (1969); see Royal, 113 N.H. at 229. See also People v. O'Sullivan, 409 N.Y.S.2d 332, 333

(1978) ("[E]ven pure speech may be subject to reasonable regulation in the public interest") (citing Cox and Adderley v. Florida, 385 U.S. 38, 48 (1966)).

The State may under certain circumstances regulate the nonspeech element of symbolic speech with justifiable incidental limitations on the speech element. In United States v. O'Brien, 391 U.S. 367, 377 (1968), the Supreme Court stated "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest."

Cline, 113 N.H. at 248. See also O'Sullivan, 409 N.Y.S.2d at 333, wherein defendant, "a devotee and practitioner of the art of tattooing", challenged a New York statute regulating tattooing as unconstitutional under the First Amendment.

[D]efendant's right to engage in tattooing is not paramount to the public's right to good health. Nor may defendant escape valid regulation by labelling his art form symbolic speech. When the object of legislation is not the suppression of free expression but the promotion of public health, there is no constitutional violation even if there is some incidental interference with liberty or property.

Id. at 333 (citations omitted).

In Cline, the New Hampshire Supreme Court held that a statute regulating the use of a flag, could and did in fact trump defendant's rights under the first amendment. "Any incidental limitation of first amendment freedoms that may result from this statute are certainly no greater than is essential to the furtherance of the state interest." Cline, 113 N.H. at 249.

Furthermore,

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586, 594-595 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had the occasion to assert that principle in Reynolds v. United States, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Id., at 166-67.

Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990).

III. A Legitimate Health Interest

The following statutes apply to body piercing.

The commissioner shall adopt rules, under RSA 541-A, relative to the hygienic practice of tattooing and sanitary operations of tattoo establishments. Such rules shall include:

I. Standards of hygiene to be met and maintained by establishments and practitioners in order to receive and maintain a license to carry out the practice of tattooing.

RSA 314-A:3, I (Supp. 2001).

The standards of hygiene and sanitary operation for the practice of tattooing adopted by rule under RSA 314-A:3, I shall also apply to the practice of body piercing taking

place in tattoo establishments required to be licensed under this chapter. For the purpose of this section, "body piercing" means any piercing of the human body.

RSA 314-A:4. Although the following statute, RSA 314-A:5, is clearly under the chapter entitled Tattoo Parlors and makes reference only thereto, respondent contends this statute applies to body piercing as well.

Nothing in this chapter shall be construed as preventing towns and cities from prohibiting or regulating the practice of tattooing under RSA 31 and RSA 47, provided that such regulation shall be no less stringent than the provisions of this chapter or rules adopted pursuant to this chapter.

RSA 314-A:5, II.

A review of the testimony given by the respondent's medical expert witness, Dr. Georgia Tuttle, thoroughly demonstrates the medical risks inherent in body piercing. Dr. Tuttle explained the physical and biological mechanics of body piercing and compared body piercing to a surgical procedure. Dr. Tuttle explained the complications that are likely to arise subsequent to piercing various parts of the body, such as the tongue - where the metal is pierced through not only epidermis and dermis but also through muscle tissue. Dr. Tuttle delineated common infections resulting from body piercing, which include allergies, syphilis, hepatitis, tuberculosis, various types of HIV, and flesh-eating bacteria.

Dr. Tuttle established that rigorous regulation of lay tattoo practitioners would not be effective to eliminate these risks. Dr. Tuttle clearly expressed that a valid regulatory scheme in the Town of Plaistow would not be adequate if the practitioners were non-medical physicians because the practice of body piercing included complex

medical issues that a health officer would have to deal with. Respondent established through its current health officer, Kimberly Onett, that the Town of Plaistow's budget for its health department is \$23,439 which is sufficient for a part-time health officer's salary and supplies, but would not suffice to monitor the regulation of lay body piercing practitioners. Dr. Tuttle opined that the Town of Plaistow's current health scheme would not be adequate to prevent the inherent health risks associated with body piercing if done by non-medical personnel.

Respondent has proven a substantial relation between the need to regulate body piercing and the health interest in reducing or eliminating the risks associated with body piercing. The legitimate state interest here is protecting the public health from the inherent risks associated with body piercing. Compare with 58 Am.Jur.2d Occupations, etc. §131 (1989) which discussed a statute regulating tattooing ("[g]iven the inherent health risks involved in tattooing, the business of tattooing is a proper subject of regulation at both the state and municipal levels") citing Grossman v. Baumgartner, 271 N.Y.S.2d 195, 199 (1966) in the footnote.²

IV. Unreasonable Regulation

² "In the case before us, there is no warrant for the charge that the Board of Health acted arbitrarily or capriciously or that the regulation under attack was unreasonable. A review of the evidence given by the defendants' witnesses thoroughly demonstrates the compelling medical necessity for section 181.15 of the Health Code. Not only was a connection shown between tattooing and hepatitis but the proof convincingly established that rigorous regulation would be ineffective." Grossman v. Baumgartner, 271 N.Y.S.2d at 199.

As noted above, in September 2000, at a Special Town Meeting, the Town of Plaistow adopted a zoning ordinance that does not merely regulate, but completely prohibits, body piercing.

Constitutional rights, for the most part, are not absolute, but must be enjoyed with some limitations. The problem of preserving individual rights under the Constitution and still securing to the state the right to protect itself is not always an easy one, and it is sometimes difficult to find the proper balance between them, there being no mathematical formula for accommodating the rights of the individual to the good of the community.

16A Am.Jur.2d Constitutional Law §385 (1989). Dr. Tuttle testified that although inherent risks exist due to body piercing, these risks can be reduced with proper precautions. Furthermore, Dr. Tuttle testified that these risks may be reduced substantially if proper licensing procedures are enacted. Thus, as adopted in September 2000, the respondent's zoning ordinance is not a reasonable regulation; the complete prohibition of body piercing, by either lay persons or medical personnel, overreaches the protections the Constitution affords.

A statute or ordinance is void for overbreadth when it offends the substantive due process notion that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964); Zwickler v. Koota, 389 U.S. 241, 250 (1967). The "crucial question" in each case is whether the statute or ordinance "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. Rockford, 408 U.S. 104, 114-15 (1972). See generally, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 884 (1970).

State v. Albers, 113 N.H. 132, 134 (1973). See State v. Pike, 128 N.H. 447, 450-51 (1986) and State v. Haines, 142 N.H. 692, 699 (1998). The Town of Plaistow's zoning ordinance completely prohibiting body

piercing is overbroad and thus unconstitutional.³ Compare with 58 Am.Jur.2d Occupations, etc. §131 (1989) ("[e]ven if tattooing was considered symbolic speech, an ordinance prohibiting all tattooing of human beings, except by licensed medical doctors for medical purposes had a valid purpose of controlling hepatitis and would withstand a constitutional challenge.") citing O'Sullivan, 409 N.Y.S.2d 332, in the footnote.

V. Conclusion

The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable: it must be exercised within constitutional limits.

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (citation and quotation omitted). In light of Dr. Tuttle's testimony, respondent has a legitimate health interest in eliminating the risks associated with body piercing. However, the prohibition respondent passed in its zoning ordinance unnecessarily includes more constitutionally protected symbolic speech than is necessary. Therefore, the Town of Plaistow's zoning ordinance passed in September 2000, is unconstitutional.

Respondent is, however, constitutionally permitted to reasonably regulate body piercing in the Town of Plaistow. Respondent's prior

³ Additional indicia that the zoning ordinance is overbroad includes its prohibition on ear piercing. Dr. Tuttle testified that piercing the ear lobe includes placing a metal stud through the two layers of dermis and epidermis and a layer of fat. Unlike piercing other parts of the body, piercing the ears does not include piercing through muscle, cartilage or bone, and the healing process is a relative short time of four weeks.

ordinance (subsequent to May 8, 2000), regulated body piercing and allowed it to be performed by licensed physicians. While such a regulation would likely withstand a constitutional challenge, (O'Sullivan, 409 N.Y.S.2d at 333), the ordinance does not authorize petitioner, a lay practitioner, to practice body piercing in the Town of Plaistow.

Finally, the court notes that the representations made by Town officials were not knowledgeable misrepresentations nor were they made with the intention of inducing petitioner to rely on them, therefore, the doctrine of estoppel invoked by the petitioner is not applicable here. Jackson v. Ray, 126 N.H. 759, 761 (1985). Petitioner, however, has an adequate remedy at law by bringing a civil suit against respondent seeking damages for his losses which were incurred as a result of his alleged reliance on the representations Town of Plaistow officials made.

In summary, petitioner's request for declaratory judgment is GRANTED IN PART, in that the respondent's Town meeting vote entirely prohibiting body piercing within the Town is unconstitutional. However, the Town may reasonably regulate the practice of body piercing for health and welfare purposes, by limiting such practice to performance by licensed medical personnel. Therefore, the petition likewise is DENIED IN PART, in that petitioner may not practice the art of body piercing in his Plaistow facility because he is not a licensed medical practitioner.

In light of the foregoing, the court rules on petitioner's Requests for Findings of Fact as follows:

GRANTED: 1-22, 24, 27-28;

DENIED: 23, 25-26, 29-30 (Dr. Tuttle did not officially testify but offered information).

The court rules on petitioner's Requests for Rulings of Law as follows:

GRANTED: 5, 9 (granted to the extent the case actually reflects the ruling proposed by petitioner), 10;

DENIED: 1-4, 8;

NEITHER GRANTED NOR DENIED: 6-7 (petitioner failed to supply cited case).

The court rules on respondent's Requests for Findings of Fact and Rulings of Law as follows:

GRANTED: 1-3, 6-9 (the correct citation is RSA 314-A:4, see also exhibit 6), 11, 15, 17 (granted to the extent that the article actually reflects these statements), 20, 22, 23 ("The question is whether the limitation imposed by our statute in constitutionally permissible), 24, 26, 29, 34;

DENIED: 4-5, 12 (as phrased), 14 (the court heard no evidence of any 1991 ordinance), 21, 25 (not accurate quote), 28, 32-33;

NEITHER GRANTED NOR DENIED: 10, 13 (as phrased - the court did not make such finding), 16, 18-19 (granted to the extent these quotes reflect the court's rulings on petitioner's motion for temporary injunction), 30;

GRANTED IN PART, DENIED IN PART: 27 (granted as to quoting Dover, denied as to quoting Young, 31 (granted as to first three sentences, denied as to fourth sentence).

So Ordered.

MARCH 7, 2002

Date

/S/

Patricia C. Coffey
Presiding Justice